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No. 91-1443

In the Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS S. MACKIE, DBA WARWICK, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, MANAGER OF FSLIC RESOLUTION FUND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner had a fair opportunity to present his case before the court of appeals and the district court.

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OPINIONS BELOW

The order of the court of appeals, Pet. App. 3, is unpublished, but the decision is noted at 948 F.2d 1285 (Table). The opinion of the district court, Pet. App. 12-18, is unreported. The opinion of the district court on rehearing, Pet. App. 6-11, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1991. A petition for rehearing was denied on December 10, 1991. Pet. App. 2. The petition for a writ of certiorari was filed on March 9, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 30, 1985, petitioner executed a promissory note (note), guaranty agreement, loan agreement, and a deed of trust in connection with a loan made by Killeen Savings and Loan Association (Killeen Savings) in the principal amount of $1,388,926. The loan agreement provided for a note to be executed with an interest rate equal to the *lesser* of (a) the maximum allowed rate or (b) "The *greater* of" two percent above the published prime rate charged by RepublicBank of Dallas, or 10.5% per annum. The note, which was subsequently executed, deleted the "greater of" language contained in the loan agreement. The loan agreement stated, however, that "[i]n the event of a conflict between any of the provisions of the Note, Deed of Trust or this Agreement, the provisions of this Agreement shall control." Pet. App. 16-17.

On January 1, 1986, petitioner defaulted on the note. Six months later, on June 27, Killeen Savings filed suit in Texas state court against petitioner seeking to recover the amounts due on the note and alleging fraud and breach of fiduciary duty. On December 12, 1986, Killeen Savings appointed a substitute trustee to act under and by virtue of the deed of trust. Three days later, Killeen Savings gave notice of the foreclosure sale of the property securing the note. On January 6, 1987, the substitute trustee sold the property pursuant to the deed of trust's terms at a public sale for $1,312,500. Petitioner filed a counterclaim, alleging that Killeen Savings had failed to bid the property's full market value at the foreclosure sale.

Petitioner sought to offset the amount of his counterclaims against the amount that he owed on the note.[1]

On August 17, 1987, the Texas state court entered sanctions in the amount of $500 against petitioner, and further ordered him to comply with Killeen Savings' discovery requests. On September 14, 1987, after petitioner failed to comply with that order, the Texas state court imposed discovery sanctions pursuant to Texas R. Civ. P. 215(3), prohibiting petitioner "from seeking further discovery of any nature from [Killeen Savings] in furtherance or support of [petitioner's] Original Counterclaim." Pet. App. 21-22.[2] The order imposing sanctions did not bar petitioner from conducting discovery related to Killeen Savings' claims on the note.

Killeen Savings' claims on the note were tried before a jury in December 1988. On December 14, the jury returned its verdict in favor of Killeen Savings.

2. On December 27, 1988, the Federal Home Loan Bank Board declared Killeen Savings insolvent and appointed the Federal Savings and Loan Insurance Corporation as receiver (FSLIC/Receiver). The FSLIC/Receiver sold its rights under the note to FSLIC in its corporate capacity, but retained the liability, if any, for petitioner's counterclaims. On January 24, 1989, the FSLIC/ Receiver intervened in this case and removed it to the United States District

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[1] Specifically, petitioner alleged violations of the Texas Deceptive Trade Practices-Consumer Protection Act, wrongful foreclosure, failure to conduct foreclosure in a commercially reasonable manner, unjust enrichment, and intentional infliction of emotional distress. He also asserted a usury claim and sought a declaratory judgment.

[2] In addition, the Texas state court ordered petitioner to pay Killeen Savings $500, representing its expenses incurred in obtaining the sanctions.

Court for the Northern District of Texas. On October 12, 1989, the Federal Deposit Insurance Corporation (FDIC) substituted itself for the FSLIC.[3]

On January 10, 1990, the FDIC, as receiver for Killeen Savings and in its corporate capacity as manager of the FSLIC Resolution Fund, moved for the entry of judgment against petitioner. On January 30, petitioner filed a motion for judgment notwithstanding the verdict and, in the alternative, for a new trial in district court. On August 22, the district court granted in part the FDIC's motion to dismiss petitioner's counterclaims. The court ruled, however, that the FDIC had failed conclusively to establish the appropriate interest rate to be applied. The court therefore denied the FDIC's motion for the entry of judgment and reopened discovery on the limited issue of the appropriate rate of interest on the note. Pet. App. 19-20.

The FDIC later moved for summary judgment, which the district court granted. The court rejected petitioner's claim that there was no evidence showing the amount of interest due on the note. Pet. App. 16. The court found that the documents in the record showed that the interest rate was to be calculated according to the terms of the loan agreement, rather than the terms of the note. *Ibid.*[4] Thereafter, the

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[3] The Federal Deposit Insurance Corporation (FDIC) later assumed FSLIC's role as receiver for Killeen Savings pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, §§ 401-406, 103 Stat. 354-363. Accordingly, the FDIC is the respondent in this action, and all further references in this brief will be to the FDIC.

[4] The district court also found that petitioner had failed to raise a genuine issue of material fact regarding several matters: (1) whether, at the time of foreclosure, Killeen Savings

district court denied petitioner's motion for reconsideration and for a new trial. *Id.* at 9. The district court also awarded the FDIC attorneys' fees, finding the request reasonable. *Id.* at 10.

3. The court of appeals summarily affirmed without opinion. Pet. App. 3.

ARGUMENT

1. Petitioner contends that by summarily disposing of his appeal without issuing an opinion the court of appeals did not adequately consider his arguments. Pet. 10-11. Appellate courts, however, have "wide latitude in their decisions of whether or how to write opinions." *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972). Requiring appellate courts to write a full opinion in every case would squander scarce judicial resources. In light of the large number of cases that come before the courts of appeals, it is not surprising that the circuits have adopted local rules that authorize the use of unpublished summary dispositions. Yet, "[t]he fact that a disposition is by informal summary order rather than by formal published opinion in no way indicates that less than adequate consideration has been given to the claims raised in the appeal." *Furman* v. *United States*, 720 F.2d 263, 265 (2d Cir. 1983). See also *NLRB* v. *Amalgamated Clothing Workers, Local 990*, 430 F.2d 966, 971 (5th Cir. 1970); *United States* v. *Cal's Tupelo Blossom U.S. Fancy*

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believed the property to be worth more than the amount owing on the note; (2) whether, at the time of foreclosure, Killeen Savings carried the property on its books at a value greater than the amount owed; (3) whether other circumstances showed the property to be worth more than the amount owed; (4) what was the fair market value of the property at the time of foreclosure; and (5) whether there were irregularities at the foreclosure sale, rendering it void. Pet. App. 15 n.1.

Pure Honey, 344 F.2d 288, 289 (6th Cir. 1965) ("it is not the policy or practice of this court, in reviewing cases on appeal where a District Court has rendered a comprehensive opinion with which we find ourselves in full agreement, to rewrite such an opinion"). Here, petitioner was afforded a trial by jury in state court, review by a district court, and full briefing and argument in the court of appeals. Petitioner has received his day in court.

2. Petitioner's next contention—that he did not receive a fair trial—consists of three claims: (1) Killeen Savings did not realize the full market value of the property at the foreclosure sale, Pet. 12-19; (2) the Texas state court erred in imposing sanctions against him which prevented him from conducting discovery on his counterclaims, Pet. 20; and (3) the evidence presented by the FDIC to the district court did not establish the amount of the deficiency, Pet. 20-21, 25-29. Each claim lacks merit.

a. Petitioner's first contention—that he was entitled to rely on the fair market value of the property to contest the amount Killeen Savings received at the foreclosure sale—ignores well-settled case law that evidence of the value of real property securing an indebtedness, which has been properly sold at public sale, does not raise an issue of fact as to the proper amount of offset to the indebtedness. Under applicable Texas law,[5] only the amount received at the sale is to

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[5] Effective April 1, 1991, the Texas legislature amended Chapter 51 of the Texas Property Code. The amendment allows a debtor to challenge the amount of a deficiency remaining after a foreclosure sale by introducing evidence of the fair market value of the foreclosed property. The new law, however, is prospective only. The Act states that an "action to recover a deficiency resulting from a foreclosure sale that is conducted before [the Act's effective date] is governed by the

be credited on the debt absent irregularities in the foreclosure sale contributing to the allegedly inadequate price. *Savers Fed. Sav. & Loan Ass'n* v. *Reetz*, 888 F.2d 1497, 1503 (5th Cir. 1989) (Texas law is well settled that inadequacy of foreclosure sale price cannot alone invalidate an otherwise valid foreclosure); *Tarrant Sav. Ass'n* v. *Lucky Homes, Inc.*, 390 S.W.2d 473 (Tex. 1965); *Greater Southwest Office Park, Ltd.* v. *Texas Commerce Bank*, 786 S.W.2d 386, 390 (Tex. Ct. App. 1990). In any event, there is no evidence to suggest that the sale price was unreasonable. Petitioner failed to raise a genuine issue of material fact regarding the amount due on the note.

b. Petitioner's next claim is that the Texas trial court erred in entering sanctions against him and that the district court erred in failing to vacate those sanctions, thereby preventing him from conducting discovery on his counterclaims. That argument also lacks merit. Petitioner failed to raise this claim in district court and therefore has waived his claim. See *Clark* v. *Aetna Casualty & Sur. Co.*, 778 F.2d 242, 249 (5th Cir. 1985) (collecting cases).[6] In addition, upon removal a federal district court takes a state court action as if everything done in state court had in fact

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law *as it existed* on the date of the sale, and the prior law is continued in effect for that purpose." Tex. H.B. No. 169 § 2 (emphasis added). The new law became effective three years after the foreclosure sale at issue here and therefore does not apply to this case. H.B. No. 169, 72d Leg., Regular Sess., 1991 Tex. Gen. Laws 39.

[6] Although petitioner had objected in state court to the denial of complete discovery, petitioner never moved to vacate or modify the state court's sanctions order. The first indication in the record that petitioner informed the district court about his payment of fees in state court came after the district court had entered summary judgment against petitioner.

been done in federal court. *Granny Goose Foods, Inc.* v. *Brotherhood of Teamsters, Local No. 70*, 415 U.S. 423, 436 (1974). Thus, the sanctions order can be treated as having been entered by the district court under Fed. R. Civ. P. 37(b)(2). District courts have broad latitude in ordering sanctions under that Rule, and their decisions should be reviewed only for an abuse of discretion. *National Hockey League* v. *Metropolitan Hockey Club*, 427 U.S. 639, 642 (1976).

c. The FDIC presented sufficient proof of each element to enforce payment of a promissory note under Texas law.[7] Because the FDIC established the amount of interest due and since petitioner presented no contrary evidence, the district court properly granted summary judgment for the FDIC. See *Celotex* v. *Catrett*, 477 U.S. 317 (1986). Petitioner also has not shown that the district court abused its discretion in limiting the scope of discovery, after granting a new trial, on the issue of the appropriate interest rate.

3. Petitioner also contends that the district court erred in its calculation of the amount of attorneys' fees due to the FDIC. Pet. 21-24. Petitioner has not presented that claim to this Court as a question for the Court to resolve, however, and the Court thus should not reach out to address it. See *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1532-1534 (1992). In any event, petitioner's fact-bound claim does not warrant further review. The granting or computation of attorneys' fees is committed to the sound discretion of the district court; such an award is reviewed only for

[7] Those elements are (1) the maker of the note signed an instrument with a promise to pay; (2) the plaintiff is the legal owner of the instrument; and (3) a sum certain is due and owing on the instrument. *Clark* v. *Dedina*, 658 S.W.2d 293, 295 (Tex. Ct. App. 1983).

errors of law and such gross miscalculations indicating that the court has abused its discretion. See, *e.g.*, *Thomas* v. *Sams*, 734 F.2d 185, 193 (5th Cir. 1984). Cf. *Pierce* v. *Underwood*, 487 U.S. 552, 562 (1988). Here, the FDIC submitted detailed affidavits showing that it had incurred reasonable and necessary attorneys' fees. As the district court noted, the FDIC's request for fees as well as the FDIC's retention of new counsel was reasonable "given both the change of forum and the substitution of the federal government for Killeen [Savings]." Pet. App. 10. In sum, the district court properly exercised its discretion in awarding attorneys' fees to the FDIC.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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